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April 6, 1998

HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: Comments of TransWire Communications, L.L.C.
In the Matter of Petition of Bell Atlantic Corporation
for Relief from Barriers to Deployment of
Advanced Telecommunications Services
CC Docket No. 98-11

Dear Ms. Roman Salas:

Transmitted herewith, on behalf of TransWire Communications, L.L.C., are an original and twelve (12) copies of its comments in the above-referenced proceeding.

In addition, also enclosed is a confirmation copy of this filing. Please date-stamp the confirmation copy and return it for our records.

Should you have any questions concerning this filing, please contact the undersigned attorney.

Very truly yours,

Randall B. Lowe

RBL/jm
Enclosures

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation	)	**CC Docket No. 98-11**
for Relief from Barriers to Deployment	)	
of Advanced Telecommunications Services	)	

COMMENTS OF TRANSWIRE COMMUNICATIONS, L.L.C.

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Dated: April 6, 1998

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COMMENTS OF TRANSWIRE COMMUNICATIONS, L.L.C.

TransWire Communications, L.L.C. ("TransWire"), by and through its attorneys, hereby submits it comments on the petition of Bell Atlantic Corporation ("Bell Atlantic") in the above-captioned proceeding (hereinafter the "Petition").

I. *Introduction*

Section 706 of the Telecommunications Act of 1996 (the "1996 Act") requires the Commission to take such steps as it deems necessary and in the public interest to ensure the "reasonable and timely" deployment of advanced telecommunications services. 47 U.S.C. § 157 (1996). By the manner of its pronouncement, Congress recognized that a regulatory regime designed for circuit-switched voice networks could impede investment in packet-switching technologies and facilities needed to provide high-quality video, data, voice, and graphics. More specifically, section 706 describes measures the Commission might take to encourage deployment of such advanced technologies, namely "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157(a) (1996). Thus, section 706 is at the heart of the 1996 Act, which, in the words of the enactors, is "[a]n Act to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies." Pub L. No. 104-104, 110 Stat. 56 (1996).

With this pro-competitive concept as a predicate, Bell Atlantic and other of the Bell Operating Companies (the "BOCs"),[1] scarcely two years after the passage of the most comprehensive regulatory reform of the telecommunications market in history, inform the Commission that "[t]he slow pace at which high-speed broadband services are becoming available to Americans today . . . confirms that existing regulatory restrictions have slowed investment in the necessary advanced services."[2] By contrast, in the relatively nascent state of the marketplace for advanced telecommunications services, new entities are emerging virtually everyday to provide innovative products and services to consumers of every ilk from Fortune 500 businesses to single-family homes.[3] Nevertheless, Bell Atlantic and the other BOCs are correct in at least two of the observations put forth by their petitions: (1) the Internet backbone in its current form is congested and cannot carry the high-quality, high-speed data traffic characteristic of the "advanced telecommunications capability" described in the 1996 Act;[4] and (2) section 706 of the 1996 Act compels the Commission to take the necessary regulatory steps to ensure that such services are deployed to all Americans in a timely manner and on reasonable terms. Yet,

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1 On February 25, 1998, US West Communications, Inc. filed a similar petition with the Commission seeking forbearance by the Commission from certain provisions of the Act that it contends act as barriers to the deployment of advanced telecommunications services. *Commission Seeks Comment On US West Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services,* Public Notice, CC Docket No. 98-26, DA 98-469 (released March 6, 1998). On March 5, 1998, Ameritech also filed a petition seeking much the same relief. *Commission Seeks Comment on Ameritech Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services*, Public Notice, CC Docket No. 98-32, DA 98-470 (released March 6, 1998).

2 Petition, page 1.

3 *See, e.g.,* "The New Trailblazers," *Business Week*, April 6, 1998, at 88 (describing the ongoing emergence and success of competitive and innovative telecommunications service providers).

4 "Advanced telecommunications capability" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video communications." 47 U.S.C. § 157(c) (1996). Former FCC Chairman Reed Hundt defined it this way: "In terms of architecture, we need a high-speed, congestion-free, always reliable, friction-free, packet switched, big bandwidth, data-friendly network that is universally available, competitively priced, and capable of driving our economy to new heights." Reed Hundt, *The Internet: From Here to Ubiquity*, Speech before the Institute of Electrical and Electronics Engineers (August 26, 1997).

neither of these two observations, whether taken alone or together, appears to justify the radical deregulation for which Bell Atlantic and the other BOCs are calling.

II. *The Bell Atlantic Petition*

On January 26, 1998, Bell Atlantic filed a petition with the Commission requesting that the Commission lift certain regulatory burdens borne by it and to do so pursuant to authority conferred upon the Commission by section 706 of the 1996 Act. Specifically, Bell Atlantic is asking the Commission (1) to lift interLATA restrictions with respect to its provision of high-speed broadband services; (2) to remove all price-cap regulation for such services; (3) to eliminate wholesale discounts for competitors; (4) to eliminate the separate affiliate rules and allow the direct provision of such services by Bell Atlantic; and (5) to remove the requirement of granting to its competitors mandatory discounted access to such services or to the required electronics as unbundled network elements ("UNEs"). Bell Atlantic contends that granting these five requests is the only way to timely deploy the advanced telecommunications capability contemplated by the 1996 Act in a competitively neutral manner.[5]

Bell Atlantic argues that section 706 of the 1996 Act requires the Commission to take these steps, because the "slow pace at which high-speed broadband services are becoming available to Americans today . . . confirms that existing regulatory restrictions have slowed investment in the necessary advanced services."[6] Bell Atlantic further argues that as a large incumbent, it is uniquely well-suited, economically and technically, to deploy the advanced telecommunications capability called for in the 1996 Act.[7] Accordingly, by its Petition, Bell Atlantic urges the Commission to expedite the process called for by section 706 and to lift the

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5 Petition, pages 12-19.

6 *Id.* at 1.

7 *Id.* at 9 (quoting favorably former FCC Chief Economist Joseph Farrell: "Sometimes, in some industries, innovation is driven by large incumbents, who alone have the expertise to innovate or the complementary assets that let them exploit bright ideas." *Competition, Innovation and Deregulation*, Speech by Joseph Farrell at Merrill Lynch "Telecommunications CEO Conference," New York, New York, March 19, 1997).

regulatory burdens impeding its deployment of advanced telecommunications capability throughout its service area.

III. *Summary Description of TransWire Communications, L.L.C. and Its Comments*

a. TransWire Communications, L.L.C.

TransWire is an advanced telecommunications services company, whose mission is to build, operate, and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Consumer Digital Modem ("CDM") technology and utilizing the existing copper wire telephone infrastructure to provide customers with both local and long distance telephone services and reliable high-speed access to the Internet, to corporate "Intranets," and to its own "Extranet." Such services will facilitate a wide variety of value-added network communications and data services and products.

CDM technology is a communications breakthrough that will enable TransWire to build a multi-city, high-speed, ATM-based network that will offer consumers advanced telecommunications services at speeds of up to one megabits per second--17 times faster that 56 kilobits per second analog modems--with simultaneous telephone voice service over a single copper telephone line. In addition, TransWire is presently testing technology which would allow transmission speeds of ten megabits per second. The CDM technology will provide a secure, "always up" connection of one megabit per second "downstream" to the user and 120 kilobits per second "upstream." Consumers will be connected to the TransWire network twenty-four hours a day, seven days a week. Moreover, customers can use this copper wire connection for simultaneous telephone and fax communications, while still connected to the Internet, corporate Intranet, or TransWire's Extranet. By integrating voice and data network services and products, TransWire will offer customers comprehensive, one-stop solutions for all of their telephone/data communications needs.

However, the success of TransWire and the ability to effectively use CDM technology hinges on access to the existing copper wire telephone infrastructure. Without access to that

element of the ILEC's network, TransWire and other companies seeking to deploy this breakthrough technology to enhance the quality and variety of telecommunications services and products available to the public will be locked out of the marketplace. Accordingly, TransWire is seriously concerned that the relief called for by Bell Atlantic will deal a serious blow to itself and other companies specializing in innovative measures to serve the nation's telecommunications needs and desires.

b. Summary of TransWire's Comments

TransWire contends that while Congress indicated a strong desire for the deployment of advanced telecommunications capability to the American people, the 1996 Act demonstrates congressional awareness and understanding that such a deployment would not occur overnight. Accordingly, Congress took significant steps to ensure that advanced telecommunications capability would be made available to the American people in a timely manner and, more importantly, in a vibrantly competitive market. TransWire fears that to grant the Petition at this time would have a seriously stifling effect on the pro-competitive goals underlying section 706 specifically and the 1996 Act more generally.

With respect to Bell Atlantic's request that the Commission permit it to provide high-speed broadband services without regard to present LATA boundaries, in addition to the unavoidable section 271 checklist, there are at least two other significant provisions of the 1996 Act militate against such a request. First, the language of section 271(g)(2) of the 1996 Act shows that Congress has both considered and decided what the BOCs may and may not do without employing separate affiliates. In that provision, Congress expressly permits the BOCs, including Bell Atlantic, to provide "incidental interLATA services" without using separate affiliates.[8] In a complementary provision, section 272(a)(2)(C), Congress provided that the BOCs may enter certain segments of the telecommunications marketplace only through separate

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8 47 U.S.C. § 271(g)(2) (1996).

affiliates.[9] Thus, Congress has both considered and decided what businesses the BOCs may enter and the manner in which they may enter them. The Commission should not take it upon itself to trump the deliberated decision of Congress by granting Bell Atlantic's requests for relief.

With respect to Bell Atlantic's request that the Commission permit it to offer advanced telecommunications services outside otherwise-applicable price-cap restrictions, the Commission should consider the pro-competitive public policy underlying section 706 specifically and the 1996 Act more generally. The removal of price-cap regulation from the advanced telecommunications marketplace raises the haunting specter of BOC cross-subsidization. The potential of such cross-subsidization poses a serious threat to a fair and competitive market for the provision of advanced telecommunications services. By cross-subsidization, large incumbents like Bell Atlantic and the other BOCs have the ability to price their offerings below market, which ineluctably serves to undercut competition--the capstone of the 1996 Act.[10] Moreover, TransWire notes that Bell Atlantic's pricing request appears to be contrary to the plain language of section 706, which authorizes the Commission to impose price cap regulation, not to eliminate it.[11] Indeed, price cap regulation is specifically intended to encourage BOC innovation, as compared with rate of return price regulation. In addition, the pricing of UNE's and other local telecommunications services is largely a matter of state jurisdiction, as established by Bell Atlantic's strident court challenge to the *Local Competition Order*.[12]

The 1996 Act expressly addresses Bell Atlantic's plea for the Commission to eliminate wholesale discounts for competitors in section 251(c)(4), which clearly imposes a resale duty

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9 47 U.S.C. § 272(a)(2)(C) (1996).

10 The Telecommunications Act of 1996 is entitled, "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996).

11 47 U.S.C. § 157(a) (1996).

12 *Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997).

upon ILECs to encourage competition in the local telecommunications market.[13] TransWire again urges the Commission not to exercise any authority under section 706 in a manner that contravenes the will of Congress.

Again, Congress explicitly addressed Bell Atlantic's request that otherwise-applicable separate affiliate restrictions be lifted with respect to its provision of advanced telecommunications services in section 272(f)(2) of the 1996 Act.[14] By enacting this sunset provision, Congress plainly recognized that a competitive market for providing advanced telecommunications would not emerge instantaneously.

Finally, and perhaps most troubling, Bell Atlantic calls on the Commission to employ its authority under section 706 to eliminate mandatory access by competitors to unbundled electronics. TransWire urges the Commission to consider that precluding competitor access to unbundled electronics would contravene rather than further the Commission's obligations under section 706, because such a restriction unavoidably impedes rather than promotes competition.[15] Moreover, section 251(d)(2),[16] considered together with section 3(45)[17] of the 1996 Act, militates in favor of the Commission giving a broad reading to which network elements are made available to competitive providers on an unbundled basis. To allow Bell Atlantic the construction for which its Petition calls could undercut radically the ability of competitive

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13 Section 251(c)(4)(A) provides: "The duty . . . to offer for resale at wholesale rates *any telecommunications service* that the carrier provides at retail to subscribers who are not telecommunications carriers . . .." 47 U.S.C. § 251(c)(4)(A) (1996).

14 47 U.S.C. § 272(f)(2) (1996).

15 Section 706 only permits the Commission to adjust the regulatory mechanisms applicable to the timely deployment of advanced telecommunications by taking measures "that promote competition in the local telecommunications market." 47 U.S.C. § 706 (1996).

16 47 U.S.C. § 251(d)(2) (1996).

17 47 U.S.C. § 153(29) (1996).

providers of advanced telecommunications services truly to compete and likely would hinder rather than hasten the deployment of the advanced services contemplated by the 1996 Act.

TransWire also believes that the Petition is premature. The pro-competitive devices embedded in the 1996 Act have not yet had sufficient time to form the vibrantly competitive telecommunications market they promise, but they certainly have created an environment that encourages innovation and American entrepreneurial ingenuity. Granting the relief requested by Bell Atlantic at this time could have severe anti-competitive results, including the stifling of the entrepreneurial spirit that has forged an economy more vigorous than any in history.

IV. *Discussion*

a. Competition and Innovation in the Advanced Telecommunications Market is Proceeding Apace

The Petition rests on a very simple "public interest" goal: "[r]emoval of [regulatory] barriers will enable the Bell Companies to use their technical and financial clout to provide advanced Internet access services to all their customers and to build larger and faster backbones that can take advantage of the local technologies."[18] According to Bell Atlantic, today's advanced services are not provided in the manner the American people should either like or need: "[t]he upper levels of the network are too slow, too congested, too unstable . . . to provide high-speed, high-bandwidth services to all Americans. Moreover, it is only getting worse . . . ."[19] TransWire finds that the Petition is essentially grounded on anecdotal perceptions of the state of competition, investment, and innovation in the advanced telecommunications market. In sum, the goals of section 706 for "advanced telecommunications capability to all Americans" are unlikely to be realized through a grant of the Petition.

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18 *White Paper Supporting Petition Under Section 706 of the Telecommunications Act of 1996*, pages 57-58 (dated Jan. 26, 1998).

19 *Id.*; *see also* Petition, pages 15-17.

b. Competition and Innovation is Better Served Through Open Access to Advanced Local Telecommunications Services

TransWire certainly applauds Bell Atlantic's efforts to deploy xDSL technologies. However, to better serve users' data and telephone needs, the ILEC's access lines and network (whether combined with xDSL or other technologies) must remain open with competitive safeguards, including unbundling and resale, for robust competition to develop. This is not just the statutory mandate of the 1996 Act, but a principle that must be held firm if local telecommunications competition is to emerge. If not, Americans will find themselves--once again--locked into local access monopolies that seemed state-of-the-art at one time, but which will eventually be surpassed by the ongoing progress of the competitive technology markets.

As Bell Atlantic correctly points out, deployment of efficient local access technologies is critical to the sustained growth of the advanced telecommunications services market. The advanced telecommunications services market is, in fact, a continuing testing ground for such new technologies: those that work and meet market demand succeed, often heartily; those that do not quickly fail. As stated by Thomas Hazlett, "[t]he rapid adoption of technologies which allow businesses and individuals to access the advanced telecommunications services market is astounding."[20] By comparison, the rate of innovation on the PSTN, which has been Bell Atlantic's proving ground for decades, is far less impressive.

Equally important for the long-term growth of advanced communications are the regulatory efforts to make the local access market more competitive, which is not where it is today. In fact, Bell Atlantic and other ILECs continue to control 99% of the country's local service business.[21] TransWire believes that it is more important to ensure the continued growth

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20 Petition, Attachment A, at 1.

21 *1996 Trends in Telephone Service*, Industry Analysis Div. - CCB, at Table 9.1 (Feb. 1998) (CAP/CLEC held a 1.0% share of Nationwide local service revenues in 1996, up from 0.7% in 1995).

of local competition--a path that the Commission has worked for so arduously--than it is to ensure the success of any given ILEC technology application as it competes on the Internet.

Moreover, it is unclear whether Bell Atlantic actually needs the exemptions from statutory and regulatory obligations in order to effectively deploy high-speed broadband services. For example, Bell Atlantic could deploy xDSL on an intraLATA basis as the market demands and consistent with existing statutory obligations. As it does so, the existing competitive Internet backbone providers will meet such demand for high-speed services, or, once Bell Atlantic obtains section 271 interLATA authority, it can enter the market to provide Internet backbone services through a section 272 affiliate. While it would obviously prefer to own all facilities from the local loop to the Internet backbone, there is no evidence of any efforts to work out alleged short-term capacity issues with the existing Internet backbone providers.[22]

Bell Atlantic also has both financial and strategic incentives to deploy intraLATA high-speed broadband services, irrespective of its Petition.[23] Financially, Bell Atlantic risks a significant loss of its existing market share in the local data access market, as the threat of other local telecommunications providers and the demand for data services become more real. Thus, Bell Atlantic, US West, and Ameritech have already announced their intentions and, in some cities, have already commenced xDSL testing. US West has already filed tariffs in several in-region states to commence xDSL service in April, 1998. In other words, within the year, the ILECs will have already invested in significant xDSL deployment throughout the United States. Indeed, it seems improbable that the Bell Companies would have so fully committed themselves

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22 For example, the Commission has held that Section 271 permits RBOCs to engage in "teaming" relationships with interLATA providers. *Non-Accounting Safeguards Order,* at ¶ 120.

23 To the extent Bell Atlantic faces any financial disincentives to deploy xDSL, they are caused by the fact that xDSL may inhibit the growth of the ILECs' second and third line sales and dedicated access (including ISDN and T1) sales. However, that disincentive exists regardless of the outcome of its Petition and suggests that Bell Atlantic may never have incentive to aggressively roll-out xDSL.

(and would have promised high bandwidth to residential and rural customers) if the feasibility of xDSL deployment actually hinges on the grant of this Petition.

In terms of strategy, Bell Atlantic must also plan to participate in the ever-growing Internet communications marketplace, and to form strategic alliances for the long term. Bell Atlantic has, in fact, already formed some powerful strategic alliances. Its participation in the ADSL Forum provides it an important strategic opportunity to work with computer hardware and software providers (*e.g.*, Microsoft, Intel, and Compaq) and other incumbent LECs (*e.g.*, US West, Ameritech, and Pacific Bell) to control and resolve xDSL technical and deployment issues. Thus, placed in the context of its long-term business interests, Bell Atlantic's need for statutory and regulatory exemptions--exemptions which ensure local telecommunications competition and competition among providers--is doubtful.

c. Consideration of the Bell Atlantic Petition is Likely Premature

The Commission has already correctly decided it will implement section 706 by first initiating a comprehensive rulemaking proceeding, as contemplated under section 706(b),[24] and not through *ad hoc* company-specific requests for deregulation such as the Petition.[25] In this way, the Commission, and interested parties, can consider the regulatory goals to be achieved by section 706, and what means the Commission should use to achieve those goals as well as the very meaning of "advanced telecommunication services."

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24 *Federal-State Board on Universal Service*, First Report and Order, CC Dkt. No. 96-45, 12 FCC Rcd. 8776, 9091 (1997) ("We concur with the Joint Board's conclusion . . . that Congress contemplated that section 706 would be the subject of a separate rulemaking proceeding."). *See also Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 5937, 5975 (Commission "reserves its right to address the implementation of Subsection 706(a) in a consolidated action"); *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd. 15497, 16120-21 (1996) (Commission declines to implement Section 706 in its Interconnection Proceeding because "[w]e intend to address issues related to section 706 in a separate proceeding").

25 Bell Atlantic should know this, insofar as it has already tried and failed to inject *ad hoc* Section 706 claims before the Commission. *800 Data Base Access Tariffs*, Order on Reconsideration, 12 FCC Rcd. 5188, 5203, 5205 (1997) ("Bell Atlantic's argument that it is being penalized for deploying more advanced technology also fails")

In short, TransWire believes that the Petition is probably premature because the public and the Commission cannot effectively evaluate such *ad hoc* requests for deregulation until the general rulemaking has been completed.

d. The Bell Atlantic Petition Seems to Be Inconsistent with Section 706 of the 1996 Act

Bell Atlantic requests exemption from two broad categories of regulatory and statutory obligations:

> (1) "permit Bell Atlantic to provide high-speed broadband services without regard to present LATA boundaries" prior to Section 271 approval and without regard to the Section 272 safeguards; and
>
> (2) "permit Bell Atlantic to develop its newer high-speed broadband services . . . including all xDSL services, free from pricing, unbundling, and separations restrictions . . . [including] . . . mandatory access by competitors . . . on a discounted wholesale basis or to required electronics . . . as unbundled network elements . . . [and] . . . otherwise - applicable price-cap and separate affiliate rules."[26]

The Petition states that section 706 authorizes and, indeed, requires the Commission to exercise regulatory forbearance authority as described in the Petition.[27]

TransWire believes that granting the Petition could create results seriously inconsistent with the public interest and manifest congressional intent. Bell Atlantic apparently calls upon the Commission to directly contravene the enumerated section 271 competitive checklist requirements and the section 272 structural separation obligations much less the mandates of section 251. Nothing in the statutory language of section 706 suggests such a path around key competitive safeguards of the 1996 Act.

Instead, section 706 authorizes the Commission to encourage advanced telecommunications for "reasonable" deployment through regulatory measures that are

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26 Petition, pages 3-4

27 Petition, pages 4-6 (The Commission has "the duty to take such action . . ..").

"consistent with the public interest" and that "promote competition in the local telecommunications market."[28] Bell Atlantic's request seems to fail to meet these statutory standards: it would exclude CLECs and other competitive providers from unbundled access to network elements necessary to deploy high-speed broadband services; it would eliminate resale of such services while continuing to hold a monopoly over local access; and it would ungird itself of competitive safeguards designed to prevent the ILECs from discrimination or cross-subsidization. In short, Bell Atlantic asks the Commission to accept a policy trade of local telecommunications competition in exchange for the mere possibility of advanced services.

e. The Manner of Bell Atlantic's Request for Relief from InterLATA Restrictions, Wholesale Resale, and Unbundling Obligations Seems Contrary to the 1996 Act

1. The Commission Should Not Exercise Statutory Authority to Forbear From Sections 271 and 251(c) of the 1996 Act

The 1996 Act specifies the manner by which Bell Atlantic may seek authority to enter the in-region interLATA services market.[29] In particular, section 271 sets out a detailed and specific procedure by which the Commission must evaluate a request for authority to enter either the interLATA telecommunications or information service markets, and obligates the Commission to monitor a BOC's continuing compliance with the competitive checklist requirements.[30] Thus, Congress has made its position quite clear: compliance with the competitive mandates of the 1996 Act and section 271 are necessary prerequisites for Bell Atlantic to enter the interLATA advanced telecommunications services market.[31] Congress further expressed this mandate by

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28 47 U.S.C. § 157(a) (1996).

29 47 U.S.C. § 271(c) (1996).

30 47 U.S.C. § 271(d) (1996).

31 TransWire notes that Bell Atlantic's proposed offering could not be deemed an "incidental interLATA service." Section 271 permits interLATA Internet services only to serve "elementary and secondary schools as

(Footnote continued to next page)

specifically foreclosing any Commission action that veers from the express terms of section 271: "LIMITATION ON COMMISSION -- The Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist . . . ."[32]

Bell Atlantic's section 251(c) resale and unbundling obligations are also unequivocal: it has a "duty to provide . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . ..", and a duty "to offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers."[33] Moreover, Congress defined "network element" quite broadly as "a facility or equipment used in the provision of a telecommunications service."[34] Thus, the high-speed broadband services, such as xDSL equipment and functionalities, that are part of Bell Atlantic's network are subject to section 251(c) unbundling and its wholesale resale obligation.

Bell Atlantic's request for the Commission to forebear from section 271 and 251(c) appears beyond the Commission's forbearance authority, which is expressly limited: "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[35] Here again, Congress has spoken in plain terms to require Bell Atlantic to open its local network up to competition, to fully unbundle and resell pursuant to section 251(c), and to meet the competitive checklist of section 271 *prior to entering* the interLATA markets.

Bell Atlantic asserts, however, that the language of section 706 that the Commission may "utiliz[e] . . . regulatory forbearance," provides a statutory basis to forbear from the requirements

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(Footnote continued from previous page)
defined in section 254(h)(5)." 47 U.S.C. § 272(g)(2); *see also* 47 U.S.C. § 272(h) (incidental interLATA service provisions shall be narrowly construed).

32 47 U.S.C. § 271(d)(4) (1996) (emphasis added).

33 47 U.S.C. § 251(c)(3) & (4)(A) (1996).

34 47 U.S.C. § 153(29) (1996).

35 47 U.S.C. § 160(d) (1996).

of section 271.[36] Section 706 merely permits the Commission *to utilize* its forbearance authority as well as a host of other regulatory devices in order to promote advanced telecommunications deployment. Thus, Congress has articulated a policy in favor of deployment of "advanced telecommunications services," which would factor into the section 10(a)(3) "public interest" determination in the context of a section 10 forbearance proceeding. The source of the Commission's forbearance authority to address this Petition, however, is still section 10 of the Communications Act, which expressly prohibits the Commission from forbearance in this case.[37]

Moreover, Congress carefully crafted section 10 to recognize only one other independent source of statutory forbearance authority, as found in section 332(c)(1)(A) of the 1996 Act.[38] Congress did not recognize section 706 as an independent source of forbearance authority. Surely, if it had been Congress' intention to create an independent basis for regulatory forbearance under section 706, then section 10(a) would have been crafted to expressly reference both section 332(c)(1)(A) and section 706. Rather, read in conjunction with section 10, the section 706 statutory language--"utilizing . . . regulatory forbearance"--merely permits the Commission to exercise its section 10 forbearance authority, among other permissible deregulatory tools, to promote advanced telecommunications.

Furthermore, as cited above, section 271(d)(4) states that the "Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist . . . ."[39] It is hard to fathom that Congress would have directed the Commission to apply every element of section 271

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36 Petition, page 10.

37 47 U.S.C. § 160(d) (1996).

38 Section 10(a) reads in pertinent part: "Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forebear form applying any regulation or provision of this Act . . . if the Commission determines that . . . enforcement . . . is not necessary to ensure that . . . charges, practices, classifications or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory . . .; [that] enforcement . . . is not necessary for the protection of consumers . . .; and [that] forbearance . . . is consistent with the public interest." 47 U.S.C. § 160(a) (1996).

39 47 U.S.C. § 271(d)(4) (1996) (emphasis added).

strictly, and yet, as Bell Atlantic contends, simultaneously permit the Commission to sweep away *all* section 271 requirements through a section 706 proceeding. Second, Bell Atlantic's view of section 706 regulatory forbearance authority[40] would vest in the Commission almost unfettered discretion to eliminate or fundamentally change statutory requirements, which is at odds with section 10 and with established precedent on the FCC's limited preemption authority.[41]

Finally, there is Bell Atlantic's argument that section 271 forbearance can be achieved through the Commission's authority under section 3(25)(B) of the 1996 Act to "modify" geographic LATA boundaries.[42] Bell Atlantic apparently seeks wholesale *elimination* of all LATA restrictions imposed by section 271, and so the Commission's authority under section 3(25) to approve a *modification* of specific LATA boundaries is inapposite in this proceeding.[43] Moreover, Bell Atlantic's contention that eliminating LATA boundaries would be consistent with the MFJ Court's waivers is arguably irrelevant.[44] It also overlooks relevant precedents, because, as the MFJ Court explained in declining to permit Pacific Bell's ownership of interLATA transmission facilities, "the prohibition against Regional Company entry into

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40 According to Bell Atlantic, Section 706 forbearance is *required* if one simple showing is made: "the requested forms of deregulation would accelerate advanced telecommunications services . . . ." Petition at 6.

41 *See MCI v. AT&T*, 512 U.S. 218 (1994).

42 Petition, pages 11-12.

43 Indeed, Bell Atlantic's approach to LATA modifications would turn the Commission's precedent on its head. *See, e.g., In the Matter of U.S. West for Limited Modification of LATA Boundaries*, Memorandum Opinion and Order, File No. NSD-L-97-31, DA 98-433, ¶¶ 6-7 (CCB rel. March 4, 1998) (among other requirements, the Section 3(25)(B) LATA modification process requires prior state approval and a showing that the change of LATA boundaries would not undermine Section 271 objectives, and "would not have a significant anticompetitive effect on the interexchange marketplace or on [Bell Company's] . . . incentive to open its local exchange and exchange access markets to competition"). *See also MCI v. AT&T*, 512 U.S. at 225 (use of the word "modify" in the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, means to "change moderately or in minor fashion").

44 Bell Atlantic cites no authority for the proposition that Section 3(25)(B) was intended to provide the Commission with the same latitude to modify the LATA boundaries, or waive LATA restrictions, as was provided to the District Court in Section VIII(C) of the MFJ.

interexchange business--like that against entry into the information services business . . .--lies at the heart of the decree."[45]

2. It is Not at All Clear That The Commission Has Authority to Forbear from Section 272 or That Such Forbearance Is Warranted

In a decision released after Bell Atlantic filed its Petition, the Common Carrier Bureau made clear that the Commission's section 272 forbearance authority is limited by section 10(d).[46] The Bureau held: "[P]rior to their full implementation we lack authority to forbear from application of the requirements of section 272 to any service for which the BOC must obtain prior authorization under section 271(d)(3)," and " that section 10(d), read in conjunction with section 271(d)(3)(B), precludes our forbearance for a designated period from section 272 requirements with regard to any service for which a BOC must obtain prior authorization pursuant to section 271(d)(3)."[47] Thus, until Bell Atlantic obtains section 271 authority to offer interLATA telecommunications and information services, the Commission already has held that it has no authority to forebear.

Even if one assumes, *arguendo*, that section 706 is an independent source of forbearance authority, the Commission's action would have to "promote competition in the local telecommunications market."[48] However, the separations, nondiscrimination, transactional, and auditing obligations of section 272 are each designed to promote local telecommunications. As the Commission explained in the *Non-Accounting Safeguards Order*,[49] the section 272

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45 *U.S. v. Western Elec. Co.*, 1986-1 Trade Cases 62,055, 62,060.

46 47 U.S.C. § 160(d) (1996).

47 *Bell Operating Companies' Petitions for Forbearance from the Application of Section 272*, Memorandum Opinion and Order, CC Dkt. No. 96-149, DA 98-220 ¶¶ 22, 23 (CCB, rel. Feb. 6, 1998). Unlike Bell Atlantic's request in this proceeding, the Bureau reasoned that it had authority to forbear from Section 272 because the E-911 and reverse directory services in question were Section 271(f) "previously authorized" services. Id. at ¶ 25.

48 47 U.S.C. § 157(a) (1996).

49 Order at ¶ 9.

safeguards "are designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition." Because Bell Atlantic would exercise market dominance over local access lines used for high-speed broadband services, it has every incentive to engage in exactly the sort of activity that section 272 is meant to proscribe. Given this, it is difficult to discern how forbearance of Bell Atlantic's section 272 obligations would promote local competition.

More broadly, TransWire believes that section 272 of the 1996 Act should not be swept away just two years after enactment simply because the Bell Operating Companies today allege that they can improve some interLATA services. Congress implemented a specific statutory scheme for a specified period with a public policy for opening up the local telecommunications marketplace, and the Commission should exercise extreme caution in second-guessing this Congressional decision.

f. Bell Atlantic's Request for Exemptions From Unbundling, Resale, and Separations Obligations Could Substantially Frustrate Local Telecommunications and Advanced Service Competition.

Section 706 requires the Commission to take "reasonable" actions in furtherance of the "public interest," and "measures that promote competition in the local telecommunications market."[50] TransWire fully supports that statutory policy. TransWire is confident that innovative telecommunications services will emerge when the ILECs have opened their monopoly access networks, and interconnect on fair and reasonable terms, as required by the 1996 Act.

Bell Atlantic's request to provide high-speed broadband services without the unbundling, separations, resale, and pricing obligations appears unreasonable, in violation of the public interest as embodied by a host of congressional and Commission policies, and contrary to the furtherance of local competition. In TransWire's view, Bell Atlantic's Petition could seriously

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50 47 U.S.C. § 157(a) (1996).

constrict all access to local data users by competing providers, while maintaining its monopoly position over local telecommunications. If so, this effort is fundamentally contrary to the public interest.

1. Neither CLECs nor Other Competitive Providers Would Have Unbundled Access to the Underlying Local Telecommunications Network

Bell Atlantic asks for the Commission to exempt its high-speed broadband services from unbundling requirements.[51] However, the 1996 Act makes quite clear that Bell Atlantic and other incumbent LECs must unbundle and provide access "at any technically feasible point," and offer all of its local telecommunications services for competing providers.[52] Congress defined "network elements" broadly and did not limit the ILEC's unbundling obligations to only those elements of its network used exclusively for voice traffic.[53] Thus, Congress unequivocally laid out a binding public policy for broad, open, and comprehensive access to the elements of the incumbent LECs' networks.

While its Petition is not entirely clear, Bell Atlantic apparently also seeks exemption from its Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI") unbundling obligations. If so, competing providers of advanced services would be denied access to the underlying telecommunications services that then would be enjoyed exclusively by Bell Atlantic. It is beyond question that such a regulatory exemption would flatly contradict the

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51 Petition, page 3.

52 47 U.S.C. § 251(c)(3) & (d)(2) (1996).

53 47 U.S.C. § 153(29) (1996) ("'network element' means a facility or equipment used in the provision of a telecommunications service"). Moreover, the definition of "telecommunications services" does not differentiate between voice and data. 47 U.S.C. § 153(46) (1996).

Commission's longstanding commitment to opening local telecommunications to preserve a vibrant information service market for the benefit of the American consumer.[54]

In both ONA and CEI, unbundling serves a number of essential functions within the federal policy framework designed to open up the local market. First, unbundling permits local telecommunications carriers to establish an early foothold in the marketplace, by allowing competitors to combine their own more limited facilities with the elements of the ILECs' ubiquitous network. In addition, unbundling ensures more competitive pricing of local retail services. If the ILEC attempts either to overcharge for a given retail service or, alternatively, to deploy inefficient elements in the provision of the service, then unbundling provides the competing provider with the incentive to compete by purchasing UNEs for a given service and recombining them with more efficient elements.

While Bell Atlantic claims that unbundling of certain xDSL equipment is unnecessary because it may be acquired by all providers,[55] this argument is contrary to the essential role of UNE rights as a systemic check on ILEC pricing. Further, the Commission has held that the availability of an element from a source other than the ILEC does not relieve the ILEC of its unbundling obligations. "Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act."[56]

TransWire urges the Commission to take notice that CDM and other emerging advanced telecommunications technologies rely on aspects of the current telephone infrastructure not

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54 *See Computer III Further Remand Proceedings*, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 95-20, 98-10, FCC 98-8, at ¶ 78 (rel. Jan. 30, 1998). ("ONA unbundling requirements serve both to safeguard against access discrimination and to promote competition and market efficiency in the information services industry").

55 Petition, page 21.

56 *Local Competition Order*, at ¶ 283.

previously employed by others. CDM technology, for example, relies on the copper wire underlying the voice networks. Moreover, in contrast to Bell Atlantic's assertion, CDM technology does involve equipment associated with the "traditional voice switch."[57] Accordingly, it is essential that the ILECs open up their networks, including the copper loops, to comprehensive access by competing providers. Without guaranteed access to the full complement of network elements, the deployment of advanced telecommunications services by competing providers could be unnecessarily delayed contrary to the goals of section 706 of the 1996 Act.

Similarly, ONA unbundling serves the public interest because it allows competing advanced service providers to recombine telecommunications elements for more efficient, or niche, services that the ILEC may be unwilling to furnish. As the Commission noted in a 1990 decision, ONA serves the public interest because it allows providers to make more efficient use of the LEC network:

> A major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers . . . promotion of efficient use of the network is one of the primary goals of the Communications Act.[58]

Finally, an exemption from unbundling requirements *at this time* could be particularly pernicious. Bell Atlantic has not demonstrated that competing ISPs or CLECs would have any other local high-speed broadband access options available to get to the end-user customer. Although Bell Atlantic claims that "the loops and other network elements . . . *are* available for rental as unbundled elements"[59] it cannot at this time demonstrate compliance with its UNE and other local competition obligations called for by the section 271 checklist.

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57 Petition, page 21.

58 *In the Matter of Computer III Remand Proceedings*, Report and Order, 5 FCC Rcd. 7719, 7720 (1990), *aff'd, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

59 Petition, page 21 (emphasis added).